

THE CORPORATIONS POWER AND FEDERALISM: KEY ASPECTS OF THE CONSTITUTIONAL VALIDITY OF THE *WORKCHOICES ACT*

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I INTRODUCTION

Since 1904, federal and State legislation have operated side by side in the area of industrial relations. Initially, the federal legislation was limited to settling inter-State industrial disputes.¹ The constitutional support for that legislation derived from s 51(xxxv) of the *Constitution*, which provides that the Parliament shall have power to make laws for the peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

The construction of the conciliation and arbitration power, and hence the permissible scope of operation of federal legislation, was once the subject of sustained attention by the High Court. The scope of the power was largely settled by a series of decisions culminating in *R v Coldham; Ex parte Australian Social Welfare Union*,² which held that the expression 'industrial disputes' in s 51(xxxv) of the *Constitution* should be given its 'popular meaning' and should include disputes between employees and employers about the terms of employment and conditions of work.

In recent years the Commonwealth Parliament has gradually attempted to broaden the scope of its industrial relations legislation by relying on other sources of legislative power. In *Victoria v Commonwealth* ('*Industrial Relations Act case*'),³ the High Court upheld the validity, primarily under the external affairs power, of federal legislative provisions dealing with topics such as the setting of minimum wages, termination of employment, parental leave, discrimination in employment and the right to strike and engage in industrial action. The external affairs power was engaged by the legislation because it sufficiently implemented various international conventions and recommendations.

Nevertheless, the provisions inserted into the *Workplace Relations Act 1996* (Cth) ('*WRA*') by the *Workplace Relations Amendment (Work Choices) Act 2005*

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1 *Conciliation and Arbitration Act 1904* (Cth).

2 (1983) 153 CLR 297.

3 (1996) 187 CLR 416.

(Cth) ('*Amending Act*') represent a radical departure from the constitutional basis upon which the previous industrial relations statutes were based. In particular, it is apparent that, for the first time, the primary source of power upon which the legislation relies is the corporations power contained in s 51(xx) of the *Constitution*. Further, as will become apparent, the legislation seeks to exclude concurrent State regulation in respect of the 'field' covered by the federal statute.

For simplicity, this paper refers to the *Workplace Amendment Act 1996* (Cth), as amended by the *Amending Act*, as the *WorkChoices Act* and the section numbering adopted by this paper is the numbering as it appears in that Act.

The new legislative regime commenced operation on Monday 27 March 2006. The States and certain unions are in the process of challenging the constitutional validity of the new regime before the High Court of Australia. The case is currently set down for six days of oral argument in early May 2006.⁴ It is worth noting the special position of Victoria, which has referred to the Commonwealth its powers with respect to, broadly, industrial relations within the State.⁵

The purpose of this article is to explore issues of constitutional interest arising out of the *WorkChoices Act*. This paper does not purport to be a comprehensive analysis of the constitutional validity of each section of the new legislation. Such an approach is best left to the pleadings and submissions of the States and unions in the proceedings currently before the High Court. Rather, this paper seeks to identify a number of points of interest that arise and to illustrate the operation of the constitutional principles involved by reference to particular provisions of the new legislation.

With that in mind, this paper is structured as follows. The scope of the *WorkChoices Act* is summarised in Part II, with particular emphasis on the definition provisions that purport to link the legislation to a constitutional 'head of power'. Part III discusses the basic principles involved in the process, known as 'characterisation', of determining whether a federal law is supported by a 'head of power'. As indicated above, the principal source of legislative power for the new legislation is the corporations power in s 51(xx) of the *Constitution*. Part IV summarises the current state of authorities in relation to the corporations power and, in particular, addresses the question of whether those provisions of the *WorkChoices Act* that directly regulate the conduct of constitutional corporations are likely to be held valid. Issues concerning the validity of provisions of the new legislation that purport to regulate the conduct of natural persons are examined in Part V. Part VI addresses the possibility of 'reading down' or confining the scope of the corporations power by reference to the conciliation and arbitration power, such that if the Commonwealth wishes to

4 Transcript of Proceedings, *State of New South Wales & Ors v Commonwealth* (High Court of Australia, Gleeson CJ, 9 March 2006).

5 *Commonwealth Powers (Industrial Relations) Act 1996* (Vic). The result is that the Commonwealth may legislate for Victoria with respect to industrial relations under s 51(xxxvii) of the *Constitution*. It is anticipated that the scope of the challenge by Victoria will be limited to matters which are not included in the reference. In that respect, for example, it may be noted that the reference does not extend to persons engaged under a 'contract for services' (definition of 'employee' in s 5) while certain provisions of the *Amending Act* purport to extend to 'independent contractors': see for example the 'Freedom of Association' provisions in Part 16 of the Act.

enter the field of 'employment relations' it must do so through, and subject to the limitations inherent in, the conciliation and arbitration power. Part VII discusses the operation of s 109 of the *Constitution* on provisions of the *WorkChoices Act* that attempt to exclude the operation of State laws. The role of the *Melbourne Corporation* doctrine as a manifestation of fundamental principles of 'federalism' and the operation of that doctrine on the new legislation is examined in Part VIII. Finally, Part IX briefly canvasses potential strategies by which the States may be able to reduce the impact of the new legislation, particularly in relation to State statutory corporations.

II THE SCOPE OF THE *WORKCHOICES ACT*

In light of the fact that the stated aim of the Amending Act is to simplify Australia's industrial relations system, the Amending Act alone is an incredibly lengthy and complex statute comprising some 762 pages of amendments to the *WRA*. Amongst other things, the *WorkChoices Act* establishes the Australian Fair Pay and Conditions Standard⁶ which makes minimum provisions for wages, annual leave, sick leave and parental leave, provides for the entry into of workplace agreements,⁷ regulates the taking of industrial action,⁸ authorises the Australian Industrial Commission to make awards⁹ and contains provisions designed to ensure that employers, employees and independent contractors have certain rights to 'freedom of association'.¹⁰

The heart of the *WorkChoices Act* is the definition of 'employer' contained in s 6 of the Act. That provision gives to the *WorkChoices Act* a distributive operation based on a range of heads of legislative power. Such drafting is a common legislative device designed to ensure that each provision of the relevant legislation is supported by at least one head of legislative power.¹¹ Thus, the expression 'employer' is defined exhaustively¹² to mean an entity falling within one or more enumerated categories, where each such category reflects the terms of a particular head of Commonwealth legislative power. The primary operation of the *WorkChoices Act* is provided by paragraph (a) of s 6(1), which provides that 'employer' means 'a constitutional corporation, so far as it employs, or usually employs, an individual'. The expression 'constitutional corporation' is in turn defined to mean a corporation to which s 51(xx) of the *Constitution*

6 *Amending Act* pt 7.

7 *Amending Act* pt 8.

8 *Amending Act* pt 9.

9 *Amending Act* pt 10.

10 *Amending Act* pt 16.

11 But see the observations of Barwick CJ in *R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1978) 143 CLR 190, 199-200.

12 The definition must be exhaustive and not inclusive: see *Stickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 468, especially 501-502, 516. In particular, if the term 'employer' had its ordinary meaning and merely included persons or entities falling within defined categories, the legislation may not demonstrate a sufficient connection with any head of power.

applies.¹³ ‘Employer’ also includes the Commonwealth or a Commonwealth authority ‘so far as it employs, or usually employs, an individual’. The legislative power supporting the operation of the *WorkChoices Act* in relation to a Commonwealth authority will be the head of power that supports the creation and continuation of that authority.

Paragraph (d) of s 6(1) defines ‘employer’ to mean ‘a person or entity ... so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as (i) a flight crew officer; (ii) a maritime employee; or (iii) a waterside worker’.

It is apparent that paragraph (d) is intended to attract constitutional support from the trade and commerce power. At first glance, it may seem odd that the Commonwealth has not attempted to move beyond flight crew officers, maritime employees and waterside workers to regulate employees of all persons engaged in inter-State trade or commerce. However, such a definition would immediately encounter the difficulty that in particular circumstances the *WorkChoices Act* may go beyond the regulation of inter-State trade and commerce authorised by s 51(i) of the *Constitution* and encroach into regulation of trade and commerce occurring within the boundary of a particular State. This issue would arise whenever an employer also engaged in intra-State activities. An attempt under the trade and commerce power to regulate the employees of such a person would be invalid¹⁴ and the question then would arise whether that operation could be severed.¹⁵ By confining an employer under paragraph (d) to a person or entity who employs a flight crew officer, a maritime employee or a waterside worker, the Commonwealth is seeking to invoke settled High Court authority in two respects. First, in *Airlines of NSW Pty Ltd v New South Wales (No. 2)* (‘*Second Airlines Case*’)¹⁶ the High Court held that the regulation of intra-State air navigation was incidental to the regulation of inter-State and overseas air navigation on the basis that regulation of the former was necessary for the safety and protection of the physical integrity of the latter.¹⁷ Insofar as paragraph (d) refers to flight crew officers, the Commonwealth is attempting to ensure that the invocation of the trade and commerce power falls within the scope of the decision in the *Second Airlines Case*, presumably on the footing that regulation of the employment conditions of such officers is reasonably necessary to protect the physical integrity of inter-State airline operations.

Secondly, the references to ‘a maritime employee’ or ‘waterside worker’ appear to be based on the decision of the High Court in *Re Maritime Union of Australia; Ex parte CSL Pacific Inc.*¹⁸ In that case, the High Court held that:

It is also well settled that, in the exercise of the trade and commerce power, the

13 That is, a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth.

14 *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.

15 See *Acts Interpretation Act 1901* (Cth) s 15A; *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634, 652; *Pidoto v Victoria* (1943) 68 CLR 87, 109; *Stickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 468, 506; *Industrial Relations Act case* (1996) 187 CLR 416, 518.

16 (1965) 113 CLR 54.

17 *Ibid.* See especially 115-117, 151.

18 (2003) 214 CLR 397.

Parliament can validly regulate the conduct of persons employed in those activities which form part of trade and commerce with other countries and among the States. A ship journeying for reward is in commerce; those who cooperate in the journeying of the ship are in commerce and the wages of those persons and the conditions of their employment relate to that commerce.¹⁹

Paragraphs (e) and (f) of s 6(1) of the *WorkChoices Act* purport to invoke the Territories power²⁰ by referring to a body corporate incorporated in a Territory or a person or entity who employs, or usually employs, an individual in connection with an activity carried on in the Territory.

The expression ‘employee’ is given by s 5 of the *WorkChoices Act* a corresponding meaning to ‘employer’, namely ‘an individual so far as he or she is employed, or usually employed, by an employer’.

III CHARACTERISATION

The Commonwealth is a government of limited legislative and executive powers. In general terms, for a federal law to be valid it must be supported by at least one constitutional ‘head of power’. There is a number of express, and at least one implied,²¹ heads of power upon which the Commonwealth may rely. The bulk, but by no means all, of those heads of power may be found in s 51 of the *Constitution*.²² For the purposes of this paper, discussion is confined to the heads of power appearing in s 51 of the *Constitution*. The Territories power in s 122 and the power with respect to Commonwealth places in s 52(i) of the *Constitution* also play a role in the constitutional support for the *WorkChoices Act*, but will not be discussed in detail in this paper.

It is useful to commence any discussion of the validity of the *WorkChoices Act* with a brief summary of the basic principles governing the process of determining whether a law is sufficiently supported by a ‘head of power’. That process is generally referred to as ‘characterisation’. Clear and concise summaries of the relevant principles are to be found in the joint judgment in *Grain Pool of Western Australia v Commonwealth*²³ and are repeated in a unanimous judgment of the Court in *Re Maritime Union of Australia; Ex parte CSL Pacific Inc.*²⁴

The first step in the process is to determine what the law does. Typically, this involves determining the legal operation of the federal law; that is, what are the

19 Ibid 413 [36].

20 *Constitution* s 122. The power conferred by s 122 ‘to make laws for the government of a Territory is a plenary power’ and all that needs to be ‘shown to support an exercise of the power is that there should be a sufficient nexus or connexion between the law and the Territory’: *Berwick Ltd v Gray, Deputy Federal Commissioner of Taxation* (1976) 133 CLR 603, 607; see also *Spratt v Hermes* (1965) 114 CLR 226, 241-242; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 271; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

21 The so-called ‘implied nationhood’ power: see generally *Davis v Commonwealth* (1988) 166 CLR 79. See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 188; *R v Sharkey* (1949) 79 CLR 121, 148-149.

22 Other important sources of federal legislative power include *Constitution* ss 52, 76, 77, 78, 122.

23 (2000) 202 CLR 479, 492 [16].

24 (2003) 214 CLR 397, 413 [35].

rights, powers, privileges, duties, obligations and liabilities that the law creates, regulates or abolishes. It is said that the practical operation of the law is also significant, although it is difficult to be precise about what this means or when there might be a sufficient practical connection but an insufficient legal connection.

The next step is to determine whether there is a ‘sufficient connection’ between the legal or practical operation of the law and at least one of the ‘heads of power’ in s 51 of the *Constitution*, such that the law ‘answers the description’ of being a law ‘with respect to’²⁵ that head of power. That involves a comparison between, on one hand, the operation of the law as discerned under the first step, and the scope of authority conferred by the relevant constitutional head of power.

At the risk of stating the obvious, the scope of the head of power is to be determined by reference to the decisions of the High Court from time to time and the constitutional text itself.²⁶ When considering the words of the *Constitution*, it is necessary to bear in mind that the *Constitution* is a ‘mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.’²⁷ Thus, the constitutional text is to be construed ‘with all the generality which the words used admit’.²⁸

The precise ‘connection’ between the law and a head of power necessary to support the law will depend upon the nature of the ‘head of power’ sought to be relied upon. In that respect, it is useful to bear in mind that the subject matters of the ‘heads of power’ in s 51 include persons,²⁹ activities³⁰ and ‘recognised categories of legislation’.³¹ Therefore if the subject matter of the power is a person,³² one would expect to find that the law regulates, imposes some obligation on, or confers some right on, such persons because they are such persons, and not merely incidentally as part of a broader regime.³³ Thus, in the context of the power to legislate with respect to people of particular races under s 51(xxvi), the requisite connection between the law and the head of power will exist if the law ‘confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race’³⁴ or has a ‘differential

25 The legislative power conferred by s 51 is a power ‘to make laws with respect to’ the enumerated categories of subject matter.

26 *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 [44].

27 *A-G (NSW) v Brewery Employees Union (NSW)* (1908) 6 CLR 469, 612 (‘*Union Label Case*’).

28 *R v Public Vehicles Licensing Appeal Tribunal (Tas)*; *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225-226; *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 [16] (‘*Grain Pool case*’).

29 Such as the certain corporations (s 51(xx)), aliens (s 51(xix)) and the people of any race for whom it is deemed necessary to make special laws (s 51(xxvi)).

30 Such as trade and commerce with other countries or among the States (s 51(i)).

31 Such as taxation (s 51(ii)), bankruptcy (s 51(xvii)) and copyrights, patents of inventions, designs and trademarks (s 51(xviii)). See *Stenhouse v Coleman* (1944) 69 CLR 457, 471.

32 Such as the certain corporations (s 51(xx)), aliens (s 51(xix)), the people of any race for whom it is deemed necessary to make special laws (s 51(xxvi)).

33 See the example given by Mason J pertaining to the corporations power in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 205-206 (‘*Actors and Announcers Equity case*’). See also *Strickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 468, particularly 502, 516.

34 *Western Australia v Commonwealth* (1995) 183 CLR 373, 461 (‘*Native Title Act Case*’).

operation upon the people of a particular race which led the Parliament to deem it necessary to enact the law'.³⁵

If the subject of the power is an activity, such as inter-State trade and commerce, the connection between the law and the head of power will be satisfied if the law regulates the conduct of that activity by conferring rights, or imposing obligations, on persons engaging in that activity. If the subject of the power is a recognised category of legislation, the task is to ask whether the law may be described as falling within that category. In the last-mentioned context, the understanding in 1900 of what comprised the relevant category of legislation will give the 'centre' of the power but not the 'circumference'.³⁶ This recognises that there may be significant scope for the Parliament to develop the law as it relates to the relevant category of legislation by, for example, altering, defining, limiting or extending rights falling within that category.³⁷

Once a 'connection', in the sense described above, exists between the law and one or more 'head of power', the law will be valid unless 'so insubstantial, tenuous or distant ... that it ought not to be regarded as enacted with respect to the specified matter falling within the Commonwealth power'.³⁸ That is to say, it does not matter that the 'best' or even 'better' description of the law is one that falls outside the scope of s 51, provided that the law also may be fairly described as a law with respect to at least one head of power in s 51.³⁹ Thus, a law providing for concessionary tax treatment of superannuation funds if the trustee invests in certain government securities may be described as a law with respect to the investment strategies of superannuation funds. However, it is also a law with respect to taxation because the obligation created by the law is an obligation to pay tax.⁴⁰

Finally, it should be emphasised that 'if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice'.⁴¹

IV CORPORATIONS POWER

Section 51(xx) of the *Constitution* provides that the Parliament shall have the power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. The power is therefore one to make laws with respect to persons of a particular kind or having particular characteristics.

It is worth noting at this point that the *WorkChoices Act* would not have been held valid under the corporations power in the early years of the federation. Nor would anyone seriously dispute that those involved in drafting and debating the

35 Ibid 460-461; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 186, 245, 261.

36 *Grain Pool case* (2000) 202 CLR 479, 493-494 [19].

37 See for example *Union Label Case* (1908) 6 CLR 469, 611-612.

38 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79.

39 See, eg, *Re F; Ex parte F* (1986) 161 CLR 376, 388.

40 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 13 (Kitto J).

41 *Grain Pool case* (2000) 202 CLR 479, 492 [16].

clauses to be contained in what would become the *Constitution* would not have considered that the corporations power could be used to support such legislation. It is apparent from sources such as the Convention Debates and Quick and Garran that the corporations power was intended to serve a fairly limited role and that far greater significance was attached to powers such as the trade and commerce power and the conciliation and arbitration power. However, as will appear, constitutional jurisprudence in this country has developed significantly since federation and much of that development has been in ways that were not, and could not have been, contemplated at the turn of the 20th century. Moreover, perhaps the greatest expansion in Commonwealth legislative power has come from the corporations power and the external affairs power.

It follows that an argument may be mounted that the corporations power, in particular, should be read in a way which conforms with its historical origins, and therefore in a manner which does not authorise legislation such as the *Work Choices Act*. This paper does not directly discuss such an argument. Rather, the sections of this paper dealing with the corporations power focus on the ‘modern’ scope of that power as elucidated by relevant High Court decisions. The departure from the original conception of the corporations power is raised in the context of the question of appropriate federal balance in section VIII of this paper.

There are two aspects to the scope of the corporations power. The first issue concerns the nature and characteristics of the persons the subject of the power. The second is the scope of authority which the power confers on the Parliament in relation to such persons.

Speaking generally, in considering the scope of authority conferred by the corporations power, three classes of law may demonstrate a sufficient connection with the head of power:

- (a) Laws which regulate the activities of constitutional corporations by imposing obligations or liabilities upon them;
- (b) Laws which impose obligations or liabilities upon natural persons as an incident of regulation of constitutional corporations; and
- (c) Laws which ‘protect’ the activities of constitutional corporations.

Particular provisions of the *WorkChoices Act* are discussed below by reference to these classes.

A Foreign, Trading and Financial Corporations

As indicated, the subject matters of the corporations power are particular categories of artificial persons. A foreign corporation clearly enough is a corporation created under the laws of another country or, in the words of Quick and Garran, ‘every corporation established beyond the limits of the Commonwealth’.⁴² It appears that the main purpose of including foreign

42 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (first published 1901, 1995 ed), 605 [195].

corporations within the scope of federal legislative power was to ensure that the rights of Australian creditors in dealing with such corporations could be protected.⁴³

The reference to 'trading corporations' and 'financial corporations' is a reference to Australian corporations whose established activities are comprised substantially, but not necessarily solely or predominantly, of trading or financial activities respectively.⁴⁴ If the company has no established activities, the 'purpose' of its incorporation, as disclosed by the company constitution, will be relevant.⁴⁵

The concept of trading activities is a broad one and encompasses 'trade' in the ordinary sense of carrying on a business or commercial venture through the provision of goods and services. Thus, for example, an incorporated football club was held to be carrying on substantial trading activities in *R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc)*.⁴⁶ In *Commonwealth v Tasmania ('Tasmanian Dam case')*,⁴⁷ a majority of the High Court held that the Hydro Electric Commission, a Tasmanian statutory corporation, was a trading corporation for the purposes of s 51(xx) on the basis that a substantial part of its established activities was comprised of trade in electricity. This was so notwithstanding that the Commission performed the role of generating and distributing electrical power in the State, traditionally a 'government function'. As Mason J stated:

The Commission has an important policy-making role. It is the generator of electrical power for Tasmania for distribution to the public and for this purpose it engages on a large scale in the construction of dams and generating plants. In this respect its operations are largely conducted in the public interest. However, ... a trading corporation whose trading activities take place so that it may carry on some other primary or dominant undertaking (which is not trading) may nevertheless be a trading corporation. The agreed facts show that the Commission sells electrical power in bulk and by retail on a very large scale. This activity in itself designates the Commission as a trading corporation.⁴⁸

It should be mentioned that the modern conception of what is and what is not a trading corporation or a financial corporation is broader than it was in 1900. Thus, in *Huddart Parker & Co Pty Ltd v Moorehead ('Huddart Parker')*,⁴⁹ Isaacs J thought that 'a purely manufacturing company is not a trading corporation' and that 'all those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes' are outside the scope of the corporations power. The modern approach is that mining and manufacturing corporations would clearly be within the scope of the power, while the other corporations mentioned may or may not

43 Ibid 606.

44 *State Superannuation Board (Vic) v Trade Practices Commission* (1982) 150 CLR 282, 304; *R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1978) 143 CLR 190, 208, 234.

45 *Fencott v Muller* (1983) 152 CLR 570, 602.

46 (1978) 143 CLR 190, 210-211, 234-236, 238-240.

47 (1983) 158 CLR 1.

48 Ibid 156.

49 (1909) 8 CLR 330, 388.

be trading corporations depending upon the actual activities that they undertake. Companies are not excluded from the ambit of the corporations power by an *a priori* application of labels such as ‘governmental’, ‘charitable’ or ‘religious’.

B Regulating the Activities of Trading or Financial Corporations

Application of the general principles of characterisation referred to above would suggest that the requisite connection between a federal law and the corporations power in s 51(xx) of the *Constitution* will be satisfied if the law has a differential operation or effect on constitutional corporations or imposes obligations or confers rights on constitutional corporations because they are constitutional corporations. The text of s 51(xx) itself does not suggest that the power is limited to regulating particular activities of constitutional corporations. The activities of a corporation are clearly relevant in determining whether it has the characteristics of a constitutional corporation, but once a corporation is a constitutional corporation, s 51(xx) would seem to confer upon the Parliament a power to make laws with respect to it. However, High Court exegesis of s 51(xx) has not quite reached that position. In order to explain why this is so, it is necessary to briefly consider some matters of history.

Prior to 1971, the corporations power effectively lay dormant as a result of the restrictive construction placed upon the power by the High Court in *Huddart Parker*.⁵⁰ Consistently with the ‘reserved powers’ doctrine that was in favour at the time, a majority of the High Court held that the corporations power did not authorise a law which invaded the exclusive State field of domestic or intra-State trade.⁵¹ Between 1920, being the year in which the High Court ‘exploded’⁵² the ‘reserved powers’ doctrine in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (‘*Engineers’ case*’),⁵³ and the enactment of the *Trade Practices Act 1965* (Cth) considered in *Strickland v Rocla Concrete Pipes Ltd*,⁵⁴ the Commonwealth did not attempt to rely on any broader construction of the corporations power.

In *Strickland v Rocla Concrete Pipes Ltd*,⁵⁵ which was decided in 1971, the High Court finally overruled the decision in *Huddart Parker* and held that, at the least, laws regulating and controlling the trading activities of trading corporations formed within the limits of the Commonwealth were laws with respect to such corporations within s 51(xx).⁵⁶ Subsequent cases revealed a split between those Justices who preferred the view that the corporations power was limited in some way to the trading activities of trading corporations and the financial activities of finance corporations⁵⁷ and those Justices that considered that ‘the subject matter

50 (1909) 8 CLR 330, 388.

51 Ibid 354 (Griffith CJ), 371-372 (O’Connor J), 409-410 (Higgins J).

52 The expression is that of Barwick CJ in *Strickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 468, 485.

53 (1920) 28 CLR 129.

54 (1971) 124 CLR 468.

55 Ibid.

56 Ibid 489 (Barwick CJ).

57 Most notably Gibbs CJ (see *Actors and Announcers Equity case* (1982) 150 CLR 169, 182-183) and Dawson J (*Tasmanian Dam case* (1983) 158 CLR 1, 316).

of the power is persons, not activities⁵⁸ and that there was no reason to give s 51(xx) a restrictive operation not expressly required by the words of the grant of power.⁵⁹

The difference of opinion was not finally resolved by any of the cases dealing with the scope of the corporations power in the 1980s and 1990s.⁶⁰ In the *Tasmanian Dam case*,⁶¹ five Justices held that ss 7 and 10 of the *World Heritage Conservation Act 1983* (Cth) were supported by the corporations power. For Mason, Murphy and Deane JJ, those provisions were valid regardless of whether or not their operation was confined to the trading activities of trading corporations. On the other hand, Gibbs CJ and Brennan J based their decision on s 10(4) of the Act which imposed the qualification that the acts prohibited must be 'for the purposes of [the corporation's] trading activities'.⁶² Accordingly, the actual decision in the *Tasmanian Dam case* and therefore its precedent value, insofar as it relates to the corporations power, is confined to the proposition that a law regulating the trading activities of a trading corporation is a law supported by s 51(xx) of the *Constitution*.

Since the *Tasmanian Dam case*, the High Court has not been required to consider the extent to which the corporations power supports a law that regulates the non-trading activities of trading corporations. The issue did not arise for decision in *Re Dingjan; Ex parte Wagner* ('*Dingjan*'),⁶³ which concerned legislation that purported to confer authority on the Australian Industrial Relations Commission to review a contract between natural persons where the contract is one 'relating to the business of a constitutional corporation'. *Dingjan* thus concerned the different issue, discussed below, of the circumstances in which the Commonwealth may regulate the conduct of natural persons under the corporations power. Nevertheless, most of the Justices discussed the corporations power in terms which suggested that the power should not be confined to the regulation of trading or financial activities of constitutional corporations.⁶⁴ Thus, for example, Mason CJ stated that he 'adhere[d] to the view ... that the corporations power is not confined in its application to the trading activities of trading corporations and the financial activities of financial corporations'.⁶⁵

58 *Tasmanian Dam case* (1983) 158 CLR 1, 148 (Mason J).

59 Most notably Mason J (*Tasmanian Dam case* (1983) 158 CLR 1, 148; *Actors and Announcers Equity case* (1982) 150 CLR 169, 207-208) and Deane J (*Tasmanian Dam case* (1983) 158 CLR 1, 269-270).

60 See especially *Actors and Announcers Equity case* (1982) 150 CLR 169; *Tasmanian Dam case* (1983) 158 CLR 1; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

61 (1983) 158 CLR 1.

62 *Tasmanian Dam case* (1983) 158 CLR 1, 119 (Gibbs CJ), 241 (Brennan J). Gibbs CJ dissented on the application of s 10 to the Hydro Electric Commission on the basis that it was not a trading corporation and that the activities prohibited were not 'trading activities'. In *Actors and Announcers Equity case* (1982) 150 CLR 169, 222 Brennan J had expressed the view that the subject matter of the power was 'corporate persons' not 'activities or relationships'. However, in the *Tasmanian Dam case*, his Honour found it unnecessary to address the issue because in his view the relevant provisions clearly related to the trading activities of the Hydro Electric Commission.

63 (1995) 183 CLR 323.

64 *Ibid* 333 (Mason CJ), 336 (Brennan J), 351-353 (Toohey J), 364 (Gaudron J in obiter dictum), 369 (McHugh J).

65 *Ibid* 333.

Similarly, McHugh J said that if ‘a law regulates the activities, functions, relationships or business of a s 51(xx) corporation, no more is needed to bring the law within s 51(xx).’⁶⁶

However, notwithstanding the observations made by individual Justices, the decision in *Dingjan* is not authority for the proposition that the corporations power authorises laws that regulate the non-trading activities of trading corporations. There are two reasons for this. First, the issue did not actually arise for decision. Secondly, the decision was decided by a 4:3 majority and one member of the majority, Dawson J, made observations that are inconsistent with any ‘broad’ view of s 51(xx).⁶⁷ His Honour said that the ‘fact that [the corporation] is a trading or financial corporation should be significant in the way in which the law relates to it.’⁶⁸ Thus, his Honour adhered to the view he had earlier expressed in the *Tasmanian Dam case*.⁶⁹

In the *Industrial Relations Act case*, an aspect of the decision concerned the operation of the corporations power in relation to ‘enterprise flexibility agreements’ under the Principal Act. However, it was conceded by Western Australia, being the only State challenging the relevant provisions of the Principal Act, that ‘the Parliament has power to legislate as to the industrial rights and obligations of constitutional corporations ... and their employees.’⁷⁰

That concession effectively conceded to the Commonwealth power to make laws of the kind now contained in the *WorkChoices Act*. It is trite to say that one would not expect such a concession to be made in the current proceedings before the High Court.

C Application to the *WorkChoices Act*

The result of the foregoing is that insofar as the *WorkChoices Act* purports to regulate the non-trading activities of constitutional corporations, there is no precedent which requires the High Court to uphold the validity of those provisions. However, it may fairly be said that the weight of judicial observation leans heavily towards a construction of s 51(xx) of the *Constitution* that is not confined to regulating the trading activities of trading corporations and the financial activities of financial corporations.

If the High Court adopts a ‘broad’ view of the corporations power, those provisions of the *Work Choices Act* that regulate the conduct of employers by imposing duties or obligations upon employers with respect to their employment relationships with employees should demonstrate a sufficient connection with the corporations power.

66 Ibid 369.

67 It is a well established, but often overlooked, principle that a ratio, or binding authority for a proposition, cannot be cobbled together from majority and minority judgments: *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 188; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, 314; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 563 [112].

68 *Dingjan* (1995) 183 CLR 323, 346.

69 *Tasmanian Dam case* (1983) 158 CLR 1, 316.

70 *Industrial Relations Act case* (1996) 187 CLR 416, 539-540.

If the High Court decides that s 51(xx) is confined to laws regulating the trading or financial activities of constitutional corporations, the issue would arise whether a law regulating the obligations and duties of a constitutional corporation, with respect to its employment relationships with its employees, can be described as a law with respect to the trading or financial activities of that corporation. In that respect, it is interesting to note that in *Huddart Parker*,⁷¹ Isaacs J considered that the corporations power did not extend to the incorporation or extinguishment of constitutional corporations⁷² and did not support laws regulating the ‘internal administration’ or ‘internal management’ of constitutional corporations. According to his Honour, this restriction disposed ‘of the contention that ... the Commonwealth Parliament would be entirely at large, and that a schedule of wages could be prescribed for these corporations.’⁷³

On the other hand, in the *Tasmanian Dam case*,⁷⁴ Deane J emphasised the interrelationship between the trading and non-trading activities of a corporation and the difficulty involved in attempting to compartmentalise them. That interrelationship is particularly evident when the putative ‘non-trading activities’ involve the conditions of employment of the corporation’s employees. In particular, those conditions may have a significant impact upon the ability of the corporation to trade, the costs and profitability of that trade and the quality of the goods or services provided.

V REGULATING THE CONDUCT OF NATURAL PERSONS

The *WorkChoices Act* goes further than merely regulating the activities of constitutional corporations and purports, in a variety of ways, to regulate the conduct of persons generally (that is, natural persons and artificial persons). For present purposes, it is sufficient to refer to three ways in which the Act purports to regulate the conduct of persons other than constitutional corporations. The first is by regulating the conduct of employees. For example, an employee is prohibited from ceasing to work for a particular employer simply because of the affiliation of that employer with an industrial association or body.⁷⁵ Another example is the provisions dealing with workplace agreements⁷⁶ and awards,⁷⁷ which purport to bind employees as well as employers.

Secondly, where the *WorkChoices Act* prohibits a constitutional corporation from engaging in particular conduct, it typically imposes a civil penalty on a person who is ‘involved in’ the contravention by the corporation.⁷⁸

The third broad way in which the *WorkChoices Act* purports to regulate the conduct of non-corporations is where the conduct itself would impact upon, or

71 (1909) 8 CLR 330, 396.

72 Subsequently confirmed in *New South Wales v Commonwealth* (1990) 169 CLR 482 (‘*Incorporation case*’).

73 *Huddart Parker* (1909) 8 CLR 330, 396.

74 (1983) 158 CLR 1, 269.

75 *Amending Act* s 795.

76 *Amending Act* pt 8.

77 *Amending Act* pt 10.

78 *Amending Act* s 728.

cause damage to, the rights of an employer or other constitutional corporation. An example is the ‘freedom of association’ provisions in Part XA.⁷⁹

It is appropriate to consider each of these in turn. The following discussion proceeds on the basis that the High Court holds that the corporations power authorises the making of laws regulating all activities, whether trading, financial or otherwise, of constitutional corporations.

A Regulation of the Conduct of Employees

As indicated above, provisions of the *WorkChoices Act* purport to regulate the conduct of employees by, for example, directly imposing duties or obligations upon employees and by purporting to subject employees to ‘binding’ workplace agreements and awards, in circumstances where an employee is not a constitutional corporation.

It is well accepted that the corporations power extends beyond simply regulating the conduct of constitutional corporations. In particular, because constitutional corporations are artificial persons that require human actors in order to act, the High Court has accepted that there will be many circumstances where regulation of natural persons is seen as reasonably incidental to a law supported by the corporations power. The reference to ‘reasonably incidental’ is a reference to the doctrine, first developed in Australia in *D’Emden v Pedder*,⁸⁰ that each grant of legislative power in the *Constitution* carries with it ‘every power and every control the denial of which would render the grant itself ineffective.’ Thus, it is said that ‘every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose.’⁸¹ If the power to regulate the conduct of constitutional corporations is to be effective, it must of necessity comprehend the power to regulate ‘the conduct of those who control, work for, or hold shares or office in those corporations.’⁸²

As Gaudron J put it ‘once it is accepted that s 51(xx) extends to the business functions, activities and relationships of constitutional corporations, it follows that it also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships.’⁸³

However, it is not enough for the validity of a law under the corporations power that the law regulates the conduct of persons having a relationship with a constitutional corporation in a manner which is unconnected with that relationship. As Justice McHugh explained in *Dingjan*:

A law that does no more than make some activity of a s 51(xx) corporation the condition for regulating the conduct of an outsider will ordinarily not be a law with respect to those corporations ... thus, a law that sought to regulate the remuneration of employment contracts made by financial analysts would not be a law with respect to s 51(xx) corporations even if the work of the analysts was entirely based

79 See especially *Amending Act* s 785.

80 (1904) 1 CLR 91, 109.

81 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77.

82 *Dingjan* (1995) 183 CLR 323, 369 (McHugh J).

83 *Ibid* 365. Her Honour dissented on the facts in that case.

upon the business activities of corporations.⁸⁴

There must be some rational connection⁸⁵ between the purported regulation of natural persons, here employees, and the valid operation of the legislation on, or with respect to, constitutional corporations. In other words, the regulation of natural persons must be reasonably appropriate and adapted towards some end that is within the corporations power.

The decision in *Dingjan* itself illustrates this limitation. In that case, the majority held that a federal law purporting to confer on the Australian Industrial Relations Commission power to vary the terms of a contract between two natural persons where that contract 'related to the business' of a constitutional corporation did not have a sufficient connection with the corporations power. This was because the word 'relates' was too broad; according to the majority, a variation of a contract that merely 'related' to the business of a constitutional corporation could easily have no impact, or no significant impact, upon the rights, liabilities or obligations of that constitutional corporation. Accordingly, the provision could not be read as a law protecting the rights of, or imposing liabilities or obligations on, the constitutional corporations referred to.

This idea is sometimes expressed as a requirement that the law have 'significance' for, or 'significantly affect', the constitutional corporation.⁸⁶ However, the real point is that a law will be supported by the corporations power if it imposes duties or obligations, or confers rights or privileges, upon constitutional corporations by reason of the fact that they are constitutional corporations. That is, the law must have a differential operation with respect to constitutional corporations.⁸⁷

Although the *WorkChoices Act* purports to regulate the conduct of employees, it appears to do so only to the extent that such conduct bears a rational relationship to the rights, privileges, liabilities or obligations of the relevant employer. So much is made clear by the definition of 'employee' in s 5 of the *WorkChoices Act*, which provides that 'employee means an individual so far as he or she is employed, or usually employed ... by an employer'. Thus, for example, if the outcome of the legislation is to regulate the employment relationships between constitutional corporations and their employees, a provision making workplace agreements or awards prescribing those employment relationships 'binding' on employees is reasonably necessary for, or reasonably appropriate and adapted to, achieving that outcome.

For the reasons discussed in this section, the provisions of the *WorkChoices Act* that impose obligations, liabilities or duties on employees as a means of regulating the employment relationship between those persons and constitutional corporations generally should be sufficiently supported by the corporations power.

84 Ibid 370.

85 Ibid 338 (Brennan J).

86 See, eg, *ibid* 346 (Dawson J), 354 (Toohey J), 369-370 (McHugh J).

87 *Ibid* 336 (Brennan J), 353 (Toohey J).

B Natural Persons ‘Involved In’ a Contravention by an Employer

The decision of the High Court in *Fencott v Muller* (*‘Fencott’*)⁸⁸ established that:

Where a law prescribing the way in which corporations shall conduct their trading activities is supported by the corporations power, an ancillary provision reasonably adapted to deter other persons from facilitating a contravention of the law by a corporation is supported by the same power. It is within the competence of the Parliament to enact such a provision to secure compliance with a valid statutory command.⁸⁹

In *Fencott*, this reasoning was used to uphold the validity of s 82 of the *Trade Practices Act 1974* (Cth) insofar as it purported to make a natural person liable for damages in respect of a breach of s 52 by a constitutional corporation if the natural person was ‘involved in’ the constitutional corporation’s breach.⁹⁰

As indicated above, s 728 of the *WorkChoices Act* provides that a person who is ‘involved in’ a contravention of a civil remedy provision is treated as having contravened that provision. A person is ‘involved in’ a contravention if the person has aided, abetted, counselled or procured the contravention, has induced the contravention or has been in any way knowingly concerned in or party to the contravention or has conspired with others to effect the contravention.⁹¹

Such a provision would appear to be reasonably adapted to deter persons from facilitating a contravention of the *WorkChoices Act* by a corporation. Accordingly, applying the reasoning in *Fencott*, s 728 should be valid as falling within the incidental aspect of the corporations power.

C Protecting the Rights of Constitutional Corporations

It follows from what has been said previously that a law conferring rights upon constitutional corporations and regulating or enjoining the conduct of natural persons in order to protect those rights, may be a valid law under s 51(xx) of the *Constitution*. The classic case on this aspect of the corporations power is the *Actors and Announcers Equity case*.⁹² That case concerned the operation of s 45D of the *Trade Practices Act 1974* (Cth).

Relevantly, that section had prohibited two natural persons, A and B, from engaging in conduct that prevented the supply of goods or services by a third person, C, to a fourth person, D, in circumstances where:

- (a) D was a constitutional corporation; and
- (b) the conduct was engaged in for the purpose of, or would have the effect of, causing substantial loss or damage to the business of D.

In argument before the High Court, the appellant had sought to describe the section as one which imposed obligations on A and B, or benefited or protected

88 (1983) 152 CLR 570.

89 Ibid 599 (Mason, Murphy, Brennan and Deane JJ).

90 See *Trade Practices Act 1974* (Cth) s 75B.

91 *Amending Act* s 728(2).

92 (1982) 150 CLR 169.

C, in circumstances where none of them was required to be a constitutional corporation. However, the High Court held that the law was supported by the corporations power. As Mason J explained:

The primary object of the provision is to protect the trading activities of the fourth person, that is, the trading activities of a corporation. The conduct described is enjoined only when its purpose and effect, broadly speaking, is to damage the business of the fourth person ... In truth, it only protects the trading activities of a non-corporation when that protection is incidental to the protection of the trading activities of a corporation – that being the primary object of the provision.⁹³

The constitutional limits, embodied in the judgment of McHugh J in *Dingjan*⁹⁴ referred to earlier, apply equally in this situation. In particular, the law will not be valid if it attempts to identify some relationship with a constitutional corporation but then proceeds to regulate the rights and liabilities of natural persons in a manner which has no rational connection with that relationship. The law must not identify a relationship with a constitutional corporation merely as a ‘peg’ upon which to ‘hang’ the law.⁹⁵

The limits referred to by McHugh J have particular significance where the connection between a federal law and the corporations power is said to be the benefit or protection of constitutional corporations. A law may benefit constitutional corporations without being a law with respect to such corporations. In the *Actors and Announcers Equity case*,⁹⁶ Mason J gave the example of a law ‘which prohibits the levying of taxes and duties on trading activities generally’. Such a law may be said to protect or promote the activities of constitutional corporations, being persons that happen to engage in trading activities, but it is not a law with respect to constitutional corporations. The reason is because the federal law does not have the necessary differential operation upon or with respect to constitutional corporations; it protects constitutional corporations and other persons equally, and the protection it gives to the latter is not merely incidental to the protection it gives to the former.⁹⁷

D Freedom of Association

The ‘freedom of association’ provisions in Part 16 of the *WorkChoices Act* illustrate the principles discussed above. Those provisions seek to ensure, in broad terms, that employers, employees and independent contractors are not subject to direct or indirect pressure to become, or not become, members of a union or other industrial association.⁹⁸ In order to achieve this objective, Part 16 imposes penalties on ‘persons who engage in conduct which prevents or inhibits employers, employees or independent contractors from exercising their rights to freedom of association’.⁹⁹

93 Ibid 200. See also 194-195 (Stephen J).

94 (1995) 183 CLR 323, 369-370.

95 Ibid 347 (Dawson J).

96 (1982) 150 CLR 169, 206.

97 Ibid.

98 *Amending Act* s 778.

99 Ibid s 778(d). The substantive provisions are in divs 3-6 (ss 789-803).

Section 785 restricts circumstances in which the substantive provisions of Part 16 apply. In particular, the Part applies only to conduct by or affecting a Commonwealth authority,¹⁰⁰ conduct in a Territory or Commonwealth place¹⁰¹ or conduct:

- (a) by a constitutional corporation;¹⁰²
- (b) against a constitutional corporation;¹⁰³
- (c) that adversely affects a constitutional corporation or that is carried out with the intent to adversely affect such a corporation;¹⁰⁴
- (d) that directly affects, or is intended to directly affect, a person in the capacity of an employee or contractor of a constitutional corporation or a prospective employee or contractor of such a corporation;¹⁰⁵ or
- (e) that consists of advising, encouraging or inciting a constitutional corporation to take or not to take, or threaten to take or not take, particular action in relation to another person.¹⁰⁶

Subject to the discussion above concerning the regulation of the non-trading activities of trading corporations, the operation of the Part under paragraph (a) above should fall within the primary aspect of the corporations power because it directly regulates the activities of, or imposes liabilities, duties and obligations on, constitutional corporations. The operation of Part 16 under paragraph (e) above should attract the reasoning in *Fencott* on the basis that its purpose and effect is to enjoin natural persons (and perhaps other corporations) from encouraging or inciting a constitutional corporation to breach the provisions of the Part. It is therefore likely to be seen as a provision that is appropriate and adapted to securing compliance with a valid statutory command.

Paragraphs (b) to (d), in terms, neither directly regulate constitutional corporations nor ensure compliance by constitutional corporations with a valid statutory command. In order for them to be valid, it is necessary that they be reasonably appropriate and adapted to protect the activities of constitutional corporations. That is, they must be capable of being characterised as provisions that confer rights on constitutional corporations. Subject to the reference to ‘intention’ in paragraph (c), paragraphs (b) and (d) above are clearly designed to protect constitutional corporations from the actions or conduct of others. In particular, the operation of Part 16 as circumscribed by those paragraphs only enjoins or penalises conduct where it is ‘against’ constitutional corporations or

100 Ibid s 786.

101 Ibid s 787, relying on s 122 and s 52 of the *Constitution* respectively. There is also an ‘extraterritorial extension’ to the operation of the Part in s 788 which would attract the external affairs power: see *Horta v Commonwealth* (1994) 181 CLR 183.

102 *Amending Act* s 785(1)(a).

103 *Amending Act* s 785(1)(b).

104 *Amending Act* ss 785(1)(c), (d).

105 *Amending Act* ss 785(1)(e), (f).

106 *Amending Act* s 785(1)(g).

‘adversely affects’ them. Accordingly, on the reasoning in the *Actors and Announcers Equity case*,¹⁰⁷ that operation should be valid. A possible reservation concerns the operation of the Part where the conduct is intended to, but does not actually, adversely affect a constitutional corporation. The connection between that operation and protection of the rights of constitutional corporations is clearly less direct than the situation where the conduct enjoined does actually adversely affect a constitutional corporation. However, it is likely that this operation of Part 16 would be valid on the basis that it is within power for the Parliament to discourage, by appropriate sanction, conduct which is directed against constitutional corporations, even if that conduct does not achieve its objective.

At first glance, the operation of Part 16 under paragraph (d) does not appear to fall neatly within any of the principles referred to above. In particular, it is not necessarily limited to protection of the activities or rights of constitutional corporations. In terms, the paragraph seeks to protect natural persons who have an employment or contractual relationship with constitutional corporations¹⁰⁸ from conduct directed at them. On one view, the reasoning in *Dingjan* may be thought to be attracted here on the footing that conduct is enjoined simply because it adversely affects a natural person who happens to have a contractual or employment relationship with a constitutional corporation. However, a closer examination of Part 16 reveals that the prescribed relationship with a constitutional corporation is not merely a ‘peg’ upon which to ‘hang’ what is in truth regulation of a different subject matter. The Part is concerned with protecting the integrity of the employment relationship, or potential employment relationship, between constitutional corporations and natural persons from, particularly union, ‘interference’. That the ‘real’ purpose of the Part may be to exclude, or at least substantially reduce the power and significance of, unions is not to the point.¹⁰⁹ What is important is that the conduct to which Part 16 applies is conduct that directly relates to the employment relationship between constitutional corporations and its actual or prospective employees and contractors. If the Commonwealth has power to regulate the terms and conditions of that relationship, it also will have power to protect the integrity of that relationship by, for example, prescribing the persons who may or may not be involved in, or ‘interfere’ with, various stages of that relationship. Accordingly, the operation of Part 16 under paragraph (d) above should have a sufficient connection with the corporations power.

VI THE CONCILIATION AND ARBITRATION POWER

It is apparent from the foregoing that, at least if the corporations power is viewed in isolation, the substantive provisions of the *WorkChoices Act* are likely to be held valid under that head of power. This raises the issue of whether there is

107 (1981) 150 CLR 169.

108 That is, employees and independent contractors.

109 The ‘task is to consider whether [the federal law] answers the description, and to disregard purpose or object’: *Grain Pool case* (2000) 202 CLR 479, 492 [16]; *Stenhouse v Coleman* (1944) 69 CLR 457, 471. See also *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 13 (Kitto J).

any express or implied provision in the *Constitution* which operates to restrict or confine the scope of that power.

Two such potential restrictions are immediately apparent – namely the *Melbourne Corporation* doctrine, discussed below, and s 51(xxxi) of the *Constitution*.¹¹⁰ However, it is equally apparent that reliance on those restrictions should not invalidate the entirety, or a substantial part, of the *WorkChoices Act*.

Accordingly, it is necessary to examine whether there is any other applicable restriction on the scope of the corporations power which may be implied from the terms of the *Constitution*. In particular, it is understood that the States and certain other challengers before the High Court may seek to raise the argument that the scope of the corporations power is confined or restricted by the conciliation and arbitration power, such that if the Parliament is seeking to legislate on matters falling broadly within the umbrella of ‘industrial relations’ it must do so in a manner which is consistent with the limits contained in s 51(xxxv) of the *Constitution*.

In the author’s view, such an argument is unlikely to succeed in light of the constitutional developments in this country over the past century. In order to fully explain the difficulties with the argument, it is necessary to briefly refer to the historical position with respect to the ‘reserved powers’ doctrine and the consequences of its abolition for principles of constitutional interpretation. This is because under that doctrine it was common to construe a head of power so as not to encroach on an area that was ‘left to the States’ under another head of power. The argument referred to above potentially raises echoes of this doctrine.

A Reserved Powers¹¹¹

In the United States, the tenth amendment of *United States Constitution*, which was proposed to the legislatures of the several States by the First Congress on 25 September 1789, provides that the powers not delegated to the United States by the *Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

This Amendment formed the foundation for the doctrine developed by the Supreme Court, and having the greatest currency prior to 1900, that the trade and commerce power generally did not extend to authorising the regulation of trade and commerce that occurred wholly within the boundaries of any one State.

For example, in 1895 the Supreme Court held that s 1 of the *Sherman Act*,¹¹² which declared illegal any contract, combination or conspiracy in restraint of trade commerce among the several States, did not apply to such a contract, combination or conspiracy in relation to the refining of sugar where that refining occurred within the boundaries of a particular State and notwithstanding that the

110 This paper does not deal directly with any potential s 51(xxxi) issues that may arise in relation to the new legislation. That issue will turn largely on a detailed analysis of the transitional provisions of the new legislation.

111 See generally the discussion in Leslie Zines, *The High Court and the Constitution* (4th ed, 1997), 1-16.

112 15 USC §1 (1890).

sugar so refined was sold inter-State.¹¹³ The essence of the Court's reasoning may be discerned from the following passage:

Slight reflection will show that, if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may effect external commerce, comparatively little of business operations and affairs would be left for State control.¹¹⁴

It appears to have been accepted that, notwithstanding the absence of any provision equivalent to the Tenth Amendment in the *Constitution*, this doctrine applied equally to the construction of federal power granted under the *Constitution*. For example, Quick and Garrahan stated that 'the control of the internal trade and commerce, which begins and ends in a State, and which does not cross its limits, is reserved exclusively to the State; it is beyond Federal control, and the right of regulating it, in each State, belongs to the State alone'.¹¹⁵ This principle of 'reserved powers' formed the basis for the decision in *Huddart Parker*,¹¹⁶ referred to earlier, that the corporations power did not authorise a law that invaded the exclusive estate field of domestic trade.¹¹⁷

As mentioned above, in 1920 in the *Engineers' case*¹¹⁸ the High Court overruled the 'reserved powers' doctrine. The result, as Barwick CJ explained in the *Second Airlines Case*, was that:

The nature and extent of State power or the interests or purposes it may legitimately seek to advance or to protect by its laws do not qualify in any respect the nature or extent of Commonwealth power. On the contrary, the extent of that power is to be found by construing the language in which power has been granted to the Commonwealth by the *Constitution* without attempting to restrain that construction because of the effect it would have upon State power.¹¹⁹

It follows that, on the current state of authority, an argument seeking to confine the scope of operation of the corporations power on the basis that the subject matter of intra-State industrial relations and industrial disputes belongs exclusively to the State will almost certainly fail. The general principle is that the 39 'heads of power' in s 51 of the *Constitution* are to be construed broadly, 'with all the generality which the words used will admit',¹²⁰ and are not to be read down or confined by reference to, and so as not to overlap with, the other heads of power in s 51.¹²¹ Thus, since the *Engineers' case* it has been accepted that the

113 *United States v E C Knight Co* 156 US 1 (1895).

114 *Ibid* 16. Later decisions tend towards a relaxation of the rigour of this principle in favour of the recognition that trade that occurs wholly within a particular State may nevertheless impact upon trade within the United States in a manner with which the federal legislature may have legitimate concern: see, eg, *Wickard v Filburn* 317 US 111 (1942); *Heart of Atlanta Motel v United States Inc* 379 US 241 (1964); *Katzenbach v McClung* 379 US 294 (1964).

115 Quick and Garrahan, above n 42, 517.

116 (1909) 8 CLR 330.

117 *Ibid* 354 (Griffith CJ), 371-372 (O'Connor J).

118 *Engineers' case* (1920) 28 CLR 129.

119 *Second Airlines Case* (1965) 113 CLR 54, 79.

120 *Grain Pool case* (2000) 202 CLR 479, 492. See also *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309, 367; *Commonwealth v Bank of New South Wales* (1948) 76 CLR 1, 332 (Dixon J) ('*Bank Nationalisation Case*').

121 See generally the discussion by Zines, above n 110, 22-26.

Commonwealth Parliament may achieve under one head of power what it could not achieve under another head of power. For example, under s 51(i), the Commonwealth may not make laws regulating the conduct of intra-State trade and commerce. However, in *Strickland v Rocla Concrete Pipes Ltd*,¹²² the High Court confirmed that the Commonwealth may regulate the conduct of constitutional corporations engaging in intra-State trade and commerce notwithstanding the limitation in s 51(i). This is no more than an application of the general principles of characterisation referred to earlier.

B When the Terms of One Head of Power May Confine the Scope of Another

The general principle that a head of power is not to be confined or read down by reference to other heads of power applies even where such a construction would render one or more of those heads of power otiose. Thus, for example, the external affairs power in s 51(xxix) confers power upon the Commonwealth to make laws with respect to relations with external countries, including those countries in the Pacific, notwithstanding that that is the whole ground covered by s 51(xxx).¹²³

The general rule referred to above gives way only where to construe a head of power without regard to the terms of another head of power would be to override or set at nought some express restriction or limitation upon the legislative power of the Commonwealth. As Dixon CJ observed in *Attorney-General (Cth) v Schmidt*:

When you have ... an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorised the same kind of legislation but without the safeguard, restriction or qualification.¹²⁴

The most obvious situation where the rule of construction referred to by Dixon CJ is invoked concerns the power in s 51(xxix) of the *Constitution* to make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. The expression 'on just terms' has been construed as a safeguard of the kind referred to by Dixon CJ in the passage set out above, such that if a Commonwealth law may be characterised as a law with respect to the acquisition of property, the restriction or safeguard is invoked and the Commonwealth must provide 'just

122 (1971) 124 CLR 468.

123 *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*'). See also *A-G (Vic) v Commonwealth* (1962) 107 CLR 529 ('*Marriage Act case*') in relation to the construction of s 51(xxi) in light of the terms of s 51(xxii).

124 (1961) 105 CLR 361, 371-372.

terms' compensation, notwithstanding that the law may also be characterised so as to fall within one or more other heads of power.¹²⁵

The express restriction in s 51(ii) against discrimination between States or parts of States in relation to taxation would presumably abstract from the other heads of power in the same way as s 51(xxxi). That is, the Commonwealth could not impose a tax on constitutional corporations incorporated within, or operating within, New South Wales alone.

So too, paragraphs (xiii) and (xiv) of s 51 confer power to make laws with respect to 'banking, other than State banking'¹²⁶ and 'insurance, other than State insurance' respectively. A bank, including a State bank,¹²⁷ will generally answer the description of a financial corporation for the purposes of s 51(xx) and a company carrying on the business of providing insurance typically would be either a trading or financial corporation for the purposes of the corporations power. Can the Commonwealth legislate to affect a State banking or State insurance relationship on the footing that the bank or insurance company providing the relevant service is a constitutional corporation within the meaning of s 51(xx)? This issue arose in *Bourke v State Bank of New South Wales*.¹²⁸ The case concerned the question of whether s 52 of the *Trade Practices Act 1974* (Cth), which relevantly drew its constitutional power from s 51(xx), validly applied to a bank, being a financial corporation formed within the limits of the Commonwealth, engaging in State banking within the limits of the relevant State. The High Court answered that question in the negative.

The Court considered two possible approaches. The first was that the restriction or safeguard represented by the words 'other than State banking' in s 51(xiii) effectively reserved to the States the field of State banking such that any intrusion into that field by the Commonwealth is invalid. The Court rejected that approach on the footing that it would run contrary to the course of constitutional development in Australia since the *Engineers' case*.

On the other hand, it was clear that the fact that a bank engaging in State banking is also a financial corporation formed within the limits of the Commonwealth for the purposes of s 51(xx) did not mean that such a bank was subject to Commonwealth power in the same way as other financial corporations. Such a result was said to be 'extraordinary'.¹²⁹ According to the High Court:

The only satisfactory solution to this problem is to accept that there is no exclusive State power to make laws with respect to State banking. But the words of s 51(xiii) still require that, when the Commonwealth enacts a law which can be characterised as a law with respect to banking, that law does not touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State

125 *Bank Nationalisation case* (1948) 76 CLR 1, 349-350; *A-G (Cth) v Schmidt (No 1)* (1961) 105 CLR 361, 371-372; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160. Cf Rosalind Dixon, 'Overriding Guarantee of Just Terms of Supplementary Source of Power?: Rethinking s 51(xx) of the Constitution' (2005) 27 *Sydney Law Review* 639.

126 The expression 'State banking' means banking conducted by or on behalf of a State and not to the State as customer: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 52, 64, 70, 78.

127 If the State Bank is incorporated.

128 (1990) 170 CLR 276.

129 *Ibid* 285.

banking.¹³⁰

The result was that if a law is not properly characterised as a law with respect to banking, ‘it is not subject to a restriction that it must not touch or concern State banking’.¹³¹

It is apparent that the *WorkChoices Act* would not be valid under the conciliation and arbitration power. If nothing else, in *Waterside Workers’ Federation of Australia v Commonwealth Steamship Owners’ Association*, it was said that the conciliation and arbitration power

does not authorise the Commonwealth Parliament to regulate conditions of employment by direct legislation, eg, to prescribe by Act of Parliament the minimum rate of wage to be paid or the maximum number of hours to be worked...¹³²

Does this raise the possibility that the corporations power should be confined by reference to some restriction or safeguard to be found in the conciliation and arbitration power? In order to succeed in such an argument, it would be necessary, on the reasoning in *Bourke v New South Wales*, to show that:

- (a) because the conciliation and arbitration power is confined in the manner suggested above, the corporations power should not be read as authorising the Commonwealth to make a law under the corporations power that may also be characterised as a law with respect to conciliation and arbitration where that law attempts to ‘regulate the conditions of employment [of employees of constitutional corporations] by direct legislation’;
- (b) the *WorkChoices Act* properly may be characterised as a law with respect to conciliation and arbitration; and
- (c) therefore, to the extent that the *WorkChoices Act* attempts to regulate by direct legislation the conditions of employment of employees of constitutional corporations, it is invalid.

The course of constitutional development and the decisions referred to earlier indicate that such an outcome is unlikely. In the first place, it is not clear that the *Work Choices Act* may sensibly be described as a law with respect to conciliation and arbitration. In the second place, it is difficult to read s 51(xxxv) as containing any restriction or safeguard of the kind contained in ss 51(ii), (xiii), (xiv) and (xxxi). The section more closely resembles s 51(i) in that it is a conferral of power upon a limited subject matter, rather than a conferral of power with respect to a broad subject matter with an express limitation, restriction or safeguard. Decisions such as *Strickland v Rocla Concrete Pipes Ltd*¹³³ would suggest that the other heads of power, including s 51(xx), should not be confined or read down by reference to the conciliation or arbitration power.

¹³⁰ Ibid 288-289.

¹³¹ Ibid 289.

¹³² (1920) 28 CLR 209, 218. See also the decisions referred to by McHugh J in *Pacific Coal Pty Ltd; Ex parte CFMEU* (2000) 203 CLR 346, 383-384.

¹³³ (1971) 124 CLR 468.

VII ATTEMPTS TO EXCLUDE STATE LAWS

The *WorkChoices Act* attempts in various respects to expressly exclude the operation of particular State laws. For example, s 16 provides that the Act is ‘intended to apply to the exclusion of’, in broad terms, State or Territory employment or industrial laws ‘so far as they would otherwise apply in relation to an employee or employer’. Section 16(2) carves out from that provision the State or Territory laws that, amongst other things, deal with the prevention of discrimination, a promotion of equal employment opportunity, superannuation, workers compensation, child labour and occupational health and safety. Section 17 should also be noted. That section provides that, subject to limited exceptions, ‘an award or workplace agreement prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency.’

At the risk of stating the obvious, the Commonwealth cannot prevent in a legal, as distinct from a political, respect the States from making a law upon a particular subject.¹³⁴ Nor can the Commonwealth Parliament legislate so as to directly render invalid what otherwise would be valid State law.

The Commonwealth Parliament can, however, make a law upon a subject within a head of power and rely upon s 109 of the *Constitution* to invalidate or, more accurately, render ‘inoperative’¹³⁵ any State law that is inconsistent with the federal law.

A Direct and Indirect Inconsistency

Inconsistency between a federal law and a State law may be said to arise in three general situations:

- (a) where there is a direct contradiction between the two laws such that it is impossible to obey both laws;¹³⁶
- (b) where the State law impairs, qualifies, negates or detracts from the operation of the Federal law;¹³⁷ and
- (c) where the Federal law ‘covers the field’ in which the State law seeks to operate.¹³⁸

The first ‘kind’ of inconsistency is known as ‘direct inconsistency’ and the remaining kinds of inconsistency may be generally described as ‘indirect inconsistency’. It is important to emphasise that there is no ‘bright line’ distinction between the two ‘kinds’ of indirect inconsistency. In particular, the foundation for both kinds of indirect inconsistency is the same, namely that:

134 *Victoria v Commonwealth* (1957) 99 CLR 575, 657 (Fullagar J) (*‘Uniform Tax Case (No 2)’*).

135 *Butler v A-G (Vic)* (1961) 106 CLR 268.

136 See, eg, *R v Licensing Court of Brisbane; Ex parte Daniel* (1920) 28 CLR 23.

137 See, eg, *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (*‘Kakariki case’*); *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61.

138 See, eg, *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47; *Viskauskas v Niland* (1983) 153 CLR 280.

The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.¹³⁹

B Effect of Express Federal Provision

Where there is direct inconsistency between a federal law and a State law, such that it is impossible to obey both laws, s 109 will operate to invalidate the State law regardless of the expressed intentions of the Commonwealth Parliament. That is to say, the Parliament cannot deem a direct inconsistency not to exist.¹⁴⁰

Where there is no direct inconsistency, the question whether there is indirect inconsistency is to be resolved by construing the federal statute. In the case of the ‘impair, negate or detract’ category, the question typically will be whether the legislation is intended to confer some positive federal right that is not to be subject to State interference.¹⁴¹ Thus, a State law that requires that a State licence be obtained before an activity is carried out is unlikely to ‘impair, negate or detract’ from a federal law that requires that a federal licence be obtained before that same activity be carried out.¹⁴² This is because the federal licence is merely a permission to do that which would be unlawful under federal law; a licence in the strict sense does not confer a ‘right’ to carry out the action.

In the same way, ‘cover the field’ inconsistency depends upon the intention that the federal legislation is to be the only legislation on the relevant subject matter or ‘field’. It is now well established that the Commonwealth Parliament may assist the High Court in construing federal legislation by inserting an express provision dealing with the intended relationship between the federal Act and State Acts. Thus, the Commonwealth may expressly provide that a particular federal Act, or part of a federal Act, is not intended to operate to the exclusion of all or particular State laws.¹⁴³ Such a provision ‘will be effective to avoid [indirect] inconsistency by making it clear that the law is not intended to be exhaustive or exclusive.’¹⁴⁴

Perhaps less intuitively, the Commonwealth Parliament may expressly provide that a particular enactment is intended to be exhaustive of the field and to operate

139 *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J).

140 *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation Australia* (1977) 137 CLR 545, 562-563.

141 See, eg, *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388, 396-397; *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453, 465; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, 628-629[35]-[39]. Cf *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253.

142 See, eg, *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54. See also *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47.

143 See, eg, *Trade Practices Act 1974* (Cth) s 75 as considered in *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation Australia* (1977) 137 CLR 545, especially 563-564 (Mason J).

144 *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation Australia* (1977) 137 CLR 545, 563.

to the exclusion of any State law intruding upon that field.¹⁴⁵ The rationale is that, as the Commonwealth Parliament has legislative power upon a subject, it is within the scope of that power for the Parliament to decide which aspects of the subject should be regulated and which should not. Often in a complex legislative scheme what is not said is at least as important as what is said. As Dixon J explained in *Wenn v Attorney-General (Vic)*:

To legislate upon a subject exhaustively to the intent that the areas of liberty designedly left should not be closed up is, I think, an exercise of legislative authority different in kind from a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with by regulation, control or otherwise. It is still more widely different from an attempt to limit the exercise of State legislative power so that the Commonwealth should not be consequentially affected in the ends it is pursuing.¹⁴⁶

It follows that, provided the subject matter is within the ambit of federal legislative power, the provisions of the *WorkChoices Act*¹⁴⁷ that purport to exclude State or Territory laws¹⁴⁸ other than in limited circumstances should be construed as an express intention that the *WorkChoices Act* 'shall be an exhaustive declaration of the law on that particular subject'.¹⁴⁹ On that basis, those provisions should be effective to attract the operation of s 109 of the *Constitution* in respect of any State law that intrudes into the 'field' covered by the *WorkChoices Act*. Moreover, it does not matter that s 16 does not exclude all State laws and allows the operation of particular 'beneficial' State laws.¹⁵⁰

C Persons with an Insufficient Connection with Australia

The foundation for the view expressed above is that the *WorkChoices Act* is attempting to regulate the 'field' from which it purports to exclude the operation of State legislation. Of course, this may not necessarily be the case in all instances. A possible example is provided by s 12 of the *WorkChoices Act* in conjunction with reg 1.1 of the *Workplace Relations Regulations 2006* (Cth). Section 12 authorises the Governor-General to promulgate regulations excluding defined persons from the operation of specified provisions in the *WorkChoices Act* provided that the Minister is satisfied that there is not a sufficient connection between the defined persons and Australia.¹⁵¹ Regulation 1.1 of the *Workplace Relations Regulations 1996* (Cth) purports to be such a regulation. In general terms, the regulation provides that the provisions of the *WorkChoices Act*, other than s 16, do not apply to foreign persons employed on certain ships engaging in

¹⁴⁵ Assuming, of course, that the 'field' is within federal legislative power.

¹⁴⁶ (1948) 77 CLR 84, 120. See also *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, 628-629[35]-[39].

¹⁴⁷ In particular, *WorkChoices Act 2005* (Cth) s 16.

¹⁴⁸ The mechanism for resolving inconsistency between federal law and a law of a Territory is somewhat different to the mechanism provided by s 109. See the judgment of Gleeson CJ and Gummow J in *Northern Territory v GPAA* (1999) 196 CLR 553.

¹⁴⁹ *Wenn v A-G (Vic)* (1948) 77 CLR 84, 119-120.

¹⁵⁰ Such as anti-discrimination or equal opportunity legislation. See *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, 629 [38].

¹⁵¹ *Amending Act* s 12(2).

inter-State trade and commerce and foreign persons or entities employing those persons. Section 16, it will be recalled, is the provision which purports to exclude the operation of State laws.

On one view, it may be said that the Commonwealth is regulating the entire field of employment relations with respect to constitutional corporations in Australia and that the effect of reg 1.1 is merely that ‘areas of liberty designedly left should not be closed up’.¹⁵²

However, there would appear to be a reasonable alternative argument that reg 1.1, in conjunction with ss 12 and 16, is a ‘bare attempt’ to exclude State laws on an area not dealt with by the *WorkChoices Act*. The consequence of such a characterisation would be that s 12 of the *WorkChoices Act*, insofar as it purports to authorise reg 1.1, may be invalid on the footing that it enters what Dixon J described as the ‘debatable area where federal laws may be found that seem to be aimed rather at preventing State legislative action than dealing with a subject matter assigned to the Commonwealth Parliament.’¹⁵³ Section 12 of the *WorkChoices Act* evinces an intention not to regulate persons with an insufficient connection with Australia, as determined by the Minister. Presumably, the Minister has determined that the foreign persons and corporations referred to in reg 1.1 do not have a sufficient connection with Australia and should not be subject to the regime created by the *WorkChoices Act*. Yet reg 1.1 nevertheless purports to leave standing, out of all the provisions of the *WorkChoices Act*, only the section that purports to exclude the operation of State laws. Thus, it may be that reg 1.1 together with ss 12 and 16 of the *WorkChoices Act* enters the ‘debatable area’ identified by Dixon J.¹⁵⁴

D Awards and Workplace Agreements

As mentioned above, s 17 of the *WorkChoices Act* purports to provide that an award or workplace agreement made under that legislation prevails over a State or Territory law to the extent of any inconsistency. On one view, this may be thought to amount to an attempt to apply s 109 directly to awards or workplace agreements, which manifestly are not ‘laws of the Commonwealth’ within the meaning of the constitutional provision. There is a long line of High Court authority dealing with the situation where aspects of federal awards are inconsistent with provisions of State laws.¹⁵⁵ Those cases establish that s 109 operates not on the inconsistency between the award and the State law but on the inconsistency between the federal law, which authorises the making of the award, and the State law. In such cases the federal legislation intends the award ‘both as to what is granted and what is refused, to be a conclusive settlement of the subject matter’,¹⁵⁶ such that any attempt by the States to interfere with the

¹⁵² *Wenn v A-G (Vic)* (1948) 77 CLR 84, 119-120.

¹⁵³ *Ibid* 120.

¹⁵⁴ *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, 628-629 [37].

¹⁵⁵ See, eg, *Ex parte McLean* (1930) 43 CLR 472; *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466; *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

¹⁵⁶ *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 491 (Isaacs J).

operation of the award would impair, detract or negate from the intended operation of the federal Act.¹⁵⁷ Understood in this light, s 17 of the *WorkChoices Act* makes it clear that the intention of the Act is that such awards or workplace agreements are intended to apply to the exclusion of State laws.

VIII APPLICATION OF THE *WORKCHOICES ACT* TO THE STATES – THE *MELBOURNE CORPORATION DOCTRINE*

A The Basic Doctrine

Sir Owen Dixon once observed that in a federal system ‘you do not expect to find either government legislating for the other.’¹⁵⁸ However, constitutional law in this country has developed along a different path. The Commonwealth may legislate to affect the States and the States may legislate to affect the Commonwealth unless there is some express or implied constitutional provision to the contrary. In the case of the States, their ability to ‘affect’ the Commonwealth against its will is limited due to the superiority which the Commonwealth enjoys in relation to its legislative¹⁵⁹ and executive powers¹⁶⁰ and the immunity from State interference or affectation accorded to the federal judiciary by Chapter III of the *Constitution*.¹⁶¹

In the case of the Commonwealth, the *Constitution* itself authorises the Commonwealth Parliament to legislate so as to affect the States in particular respects.¹⁶² In addition, as indicated, since the *Engineers’* case, provided a federal law falls within a head of power it will be valid notwithstanding that it imposes obligations, liabilities or duties upon the States. That general position is subject to the overriding qualification that the Commonwealth cannot ‘affect’ the States if to do so would offend some express or implied constitutional prohibition.

For present purposes, the most significant such prohibition is the implication known as the *Melbourne Corporation* doctrine.¹⁶³ The constitutional basis of the doctrine is clear and well understood, but the scope and limits of the doctrine, particularly following the recent decision in *Austin v Commonwealth* (*‘Austin’*),¹⁶⁴ are somewhat uncertain. The doctrine derives from the fact that the *Constitution* establishes, and allocates powers between the components of, a federal system comprising a central government with limited powers and a number of other geographically based governments separately organised and

157 See also *Ex parte McLean* (1930) 43 CLR 472, 484.

158 *Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 529.

159 Through s 109 of the *Constitution*.

160 *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372; *Re Residential Tenancy Tribunal of NSW & Henderson* (1997) 190 CLR 410, 463.

161 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

162 See, eg, *Constitution* ss 51(xxxi), 78, 86, 102, 112, 114. See also the discussion in *Austin v Commonwealth* (2003) 215 CLR 185, [114] (Gaudron, Gummow and Hayne JJ).

163 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

164 (2003) 215 CLR 185.

independent of the central government.¹⁶⁵ It follows that the central government is not permitted to legislate so as to destroy the other governments in the federation or to impair or curtail the rights, functions or powers of those governments such that their existence as independent entities in the federation is threatened. That is, the Commonwealth cannot ‘destroy or curtail the continued existence of the States or their capacity to function as governments’.¹⁶⁶

Prior to *Austin*, the doctrine contained another, apparently freestanding, ‘limb’ which prohibited the Commonwealth from discriminating against the States or imposing special burdens or disabilities upon them.¹⁶⁷ In *Austin*, Gaudron, Gummow and Hayne JJ and Kirby J expressed the view that the ‘discrimination’ limb of the *Melbourne Corporation* doctrine should no longer be treated as a sufficient condition for the invalidity of a federal law.¹⁶⁸ For the joint judgment, this was because of the difficulties involved in applying the concept of discrimination to a law which affects the States or a State, but does not affect natural persons or other legal persons. The essence of discrimination lies in the equal treatment of unequals or, perhaps less obviously, the unequal treatment of equals.¹⁶⁹ It may be difficult to identify the sense in which the States on the one hand and natural persons or legal persons such as corporations on the other hand can be said to be relevantly equal so as to permit of the comparison required in order to determine that a law is ‘discriminatory’ in the legal sense.¹⁷⁰

The ‘curtailment’ limb involves difficult questions of degree. Where is the line to be drawn between permissible affectation of the States by federal legislation and impermissible curtailment or impairment of the States’ capacity to function as governments? Moreover, what is meant by the expression ‘the States’ capacity to function as governments’?

A useful starting point in attempting to give content to that expression is the following passage from the joint judgment of six members of the High Court in *Western Australia v Commonwealth* (‘*Native Title Act case*’):

The relevant question is whether the Commonwealth law affects what Dixon J called the ‘existence and nature’ of the State body politic. As the *Melbourne Corporation Case* illustrates, this conception relates to the machinery of government and to the capacity of its respective organs to exercise such powers as are conferred upon them by the general law which includes the Constitution and the laws of the Commonwealth. A Commonwealth law cannot deprive the State of the personnel, property, goods and services which the State requires to exercise its

165 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, especially 218 (Mason J); *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 227; *Industrial Relations Act case* (1996) 187 CLR 416, 498; *Austin* (2003) 215 CLR 185.

166 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217; *Austin* (2003) 215 CLR 185, [124].

167 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217.

168 Although four Justices reached this position, it is not binding authority because one of those Justices, Kirby J, was in dissent: *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 188; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 563 [112].

169 *Street v Queensland Bar Association* (1989) 168 CLR 461, 571-573; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 480; *Cameron v The Queen* (2002) 209 CLR 339, 343-344 [15].

170 See the discussion in *Austin* (2003) 215 CLR 185, [118]-[121].

powers and cannot impede or burden the State in the acquisition of what it so requires.¹⁷¹

It may be observed that it is difficult to see how ‘the laws of the Commonwealth’ may confer upon the States powers upon which the *Melbourne Corporation* doctrine then operates to invalidate ‘interference’ by another federal law with the exercise of those powers. Rather the principles of express or implied repeal would appear to be involved.

Recent High Court authority establishes three minimum propositions concerning the operation of the doctrine. First, the Commonwealth may not exercise its legislative or executive powers to control the States on the basis that such an exercise of power would be inconsistent with the continued existence of the States as independent entities and their capacity to function as such.¹⁷² The second is that the Commonwealth cannot exercise its legislative or executive powers to prevent the State from determining ‘the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and ... the number and identity of the person whom it wishes to dismiss ... on redundancy grounds.’¹⁷³ Thirdly, the Commonwealth cannot prevent the State from determining the terms and conditions of employment of persons ‘at the higher levels of government’.¹⁷⁴

Whatever other possible application the *Melbourne Corporation* doctrine may have in relation to the *WorkChoices Act*, it is at least clear that the Act cannot apply to the States insofar as it affects the States’ ability to determine the conditions of employment of persons ‘at the higher levels of government’. Such persons would include at least Ministers, ministerial assistants and advisers, heads of departments and high-level statutory office holders, parliamentary officers and judges.¹⁷⁵ Consistently with the *Industrial Relations Act case*,¹⁷⁶ the *WorkChoices Act* will be read down by reference to that ‘well established limitation’ on federal legislative power. To the extent that the *WorkChoices Act* would operate to prevent the States from determining who they wish to employ, the term of that employment or who they wish to dismiss on redundancy grounds, the legislation would be invalid to that extent also.

B The Federal Balance

As the discussion above indicates, upon application of current orthodox constitutional doctrine, the *WorkChoices Act* should largely be valid. There may be aspects of the legislation, and particular operations of the legislation, that fall foul of particular express or implied constitutional prohibitions or that do not demonstrate a sufficient connection with a head of power, but to a large extent

171 *Western Australia v Commonwealth* (1995) 183 CLR 373, 480; *Austin* (2003) 215 CLR 185, 259 [146] (Gaudron, Gummow and Hayne JJ).

172 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 233; *Industrial Relations Act case* (1996) 187 CLR 416, 498.

173 *Ibid.*

174 *Ibid.*

175 *Ibid.*

176 *Ibid* 503.

the legislation should be valid as supported by the corporations power. It is now too late in the day to raise a 'reserved powers' style argument that industrial relations are to be left to the States except insofar as s 51(xxxv) of the *Constitution* authorises the enactment of federal laws dealing with the subject of inter-State industrial disputes.

However, it appears to the author there is an argument which may be mounted that by approaching decisions on a case by case basis in accordance with the common law method, the High Court has permitted too significant a departure from the principles of federalism required by the *Constitution* and embodied in the *Melbourne Corporation* doctrine.

The starting point in such an argument is that there can be no doubt that in the early days of the federation, legislation such as the current *WorkChoices Act* would be struck down as invalid by the High Court on the basis that it offended the federal balance required by the *Constitution* (as manifested in the 'reserved powers' doctrine). Over time, the federal balance has shifted. The major causes of this shift were identified in a famous passage by Sir Victor Windeyer in *Victoria v Commonwealth* ('Payroll Tax case'):

The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the *Constitution* did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned.¹⁷⁷

It is suggested that this passage exposes what are otherwise unexpressed 'policy' considerations underlying the judgments, with notable exceptions, of the High Court in the field of constitutional law over the past 80 years. In particular, it is suggested that underlying the approach of the High Court to questions of federal power and the 'federal balance' during that period is the notion that federalism is effectively a transitional form of government which is designed to ease the transition from independent polities to full 'nationhood'. It follows from that starting point that while the ties that bind together the constituent elements of the federation are fragile, the 'federal balance' should tend to favour the formerly independent polities over and above the newly created central government. No doubt, this is necessary to ensure that local, territorially based, sentiments and feelings are nurtured and protected. Over time, and with the occurrence of the events referred to by Windeyer J, the federation may develop a national identity which then provides the basis and justification for the shifting of the federal balance in favour of the central, national, government.

Such an approach may be discerned in the course of constitutional development in this country. Thus, as discussed above, in the early days of the

177 (1971) 122 CLR 353, 395-396.

federation the 'rights' of the States were protected by the 'reserved powers' and 'inter-governmental immunities' doctrines. With the abolition of those doctrines,¹⁷⁸ federal legislation began to intrude into areas previously considered to be the domain of the States. This process reached an apotheosis with the decisions on the external affairs power upholding the validity of legislation if it sufficiently implemented a treaty upon any subject whether or not of 'international concern'.¹⁷⁹

Running parallel with this expansion of the scope of the federal legislative power is the use by the Commonwealth of the grants power in s 96 of the *Constitution* to bring the States into line with federal policy. The most significant event in that process was the decision in the *First Uniform Tax case*¹⁸⁰ that, through a combination of the taxation power and the grants power, the Commonwealth could 'encourage' the States to 'voluntarily' withdraw from the field of income taxation.¹⁸¹ As others have observed,¹⁸² this led to a significant increase in the States' financial dependence on the Commonwealth. This has been further augmented by the enactment of the GST following the decision of the High Court in *Ha v New South Wales*¹⁸³ that State tobacco licence fees were invalid as duties of excise.¹⁸⁴

The continued expansion of federal legislation and the financial dependence of the States on the Commonwealth means that the practical significance of the States in the day to day lives of the inhabitants of Australia is much diminished when compared to the position in the early days of the federation. This raises an issue regarding the appropriate relationship between, on the one hand, the role of the judiciary in interpreting the *Constitution* as an instrument of government intended 'to endure through a long lapse of ages'¹⁸⁵ and, on the other hand, the entrustment by s 128 of the *Constitution* in the people of Australia of the mechanism for constitutional change. Thus, it is one thing to say that the *Constitution* contemplates 'changes in the political and constitutional relationship between the United Kingdom and Australia', such that the United Kingdom is now a 'foreign power' and its citizens 'aliens' for the purposes of the

178 In the *Engineers' case* (1920) 28 CLR 129. For a detailed and useful discussion of the significance of the *Engineers' case*, see Keven Booker and Arthur Glass, 'The Engineers' Case' in Hoong Phun Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 34-61.

179 The sequence of decisions by which this position was reached is: *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Tasmanian Dam case* (1983) 158 CLR 1. See also *Industrial Relations Act case* (1996) 187 CLR 416, 484-485.

180 *South Australia v Commonwealth* (1942) 65 CLR 373. The validity of those provisions was upheld in the *Uniform Tax case (No 2)* (1957) 99 CLR 575.

181 In basic terms, this was done by imposing federal income tax at a very high rate and then distributing a portion of the revenue raised by that tax to the States under the grants power on the condition that the States did not impose their own income tax.

182 See, eg, Cheryl Saunders, 'The Uniform Income Tax Cases' in Lee and Winterton (eds), above n 178, 62-84.

183 (1997) 189 CLR 465.

184 *Constitution* s 90. The pressure brought to bear by the Treasurer, Peter Costello, on the States to significantly reduce State taxes, and the acceptance the States of that reduction, is a recent and graphic illustration of the significant political influence that the Commonwealth wields over the States through their purse strings.

185 *Martin v Hunter's Lessee*, 14 US 304, 326 (1816).

Constitution.¹⁸⁶ However, it may be another thing entirely for the judiciary to significantly alter the factual circumstances upon which s 128 itself will operate to bring about constitutional change.

If one day a referendum under s 128 of the *Constitution* calling for the abolition of the States and the establishment of a unitary system of government is successful, to what extent will it be the case that the outcome was brought about primarily by the decisions over a period of time by the judiciary? Further, to what extent is such a situation consistent with the fundamental principles of constitutional interpretation succinctly articulated by Gummow J in *SGH Ltd v Commissioner of Taxation*:

[Q]uestions of constitutional interpretation are not determined simply by linguistic considerations which pertained a century ago. Nevertheless, those considerations are not irrelevant; it would be to pervert the purpose of the judicial power if, without recourse to the mechanism provided by s 128 and entrusted to the Parliament and the electors, the *Constitution* meant no more than what it appears to mean from time to time to successive judges exercising the jurisdiction provided for in Ch III of the *Constitution*.¹⁸⁷

This paper does not suggest that these concerns should be addressed through some attempt to restore the ‘reserved powers’ doctrine in another guise. Rather, the existing mechanism for the preservation of the federal balance, namely the *Melbourne Corporation* doctrine, could be developed. In particular, if the *Melbourne Corporation* doctrine is to continue to reflect fundamental principles of federalism, it ought to be the case that the doctrine is engaged at a point in time when the sum effect of all federal action, legislative and political, is that the practical ability of the States to perform their constitutional role is substantially impaired or curtailed. In other words, in considering the application of the *Melbourne Corporation* doctrine, a departure from the case by case analysis that is the hallmark of the common law method may be required. The question would cease to be ‘does this particular legislation, considered on its own, significantly impair the ability of the States to function as such?’ and would become ‘when account is taken of the particular legislation before the court in light of other legislative, and perhaps even executive, measures undertaken by the Commonwealth, is the capacity of the States to play a *practical role* in the federation significantly impaired or curtailed?’.

On this approach, there would come a point when the sheer breadth and volume of federal legislation and executive action will have so reduced the practical ability of the States to legislate on or take action in relation to any issue of significance for the people of those States that particular further federal legislation or executive action is invalid under the *Melbourne Corporation* doctrine.

It is not suggested that this point is necessarily reached in respect of the *WorkChoices Act*, but merely that it may be worthwhile raising this kind of argument so that, if nothing else, the High Court is driven to re-consider the

186 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28. See also *Sue v Hill* (1999) 199 CLR 462, 487-492 [50]-[65].

187 (2002) 210 CLR 51, 75 [44].

issues of federalism and ‘federal balance’ which lay at the heart of much of Sir Owen Dixon’s constitutional jurisprudence.¹⁸⁸

IX STRATEGIES TO REDUCE THE IMPACT OF THE NEW LEGISLATION

Assuming that the *WorkChoices Act* is substantially valid, what can the States do to insulate or protect themselves and the people of each State from the impact of the federal legislation?

To the extent that State activities are carried out by statutory corporations that are constitutional corporations,¹⁸⁹ the *WorkChoices Act* will prima facie govern the employment relations of those corporations.¹⁹⁰ No doubt there are aspects of the new provisions which the States will be keen to ensure do not apply to their statutory corporations. The obvious way to achieve this is to abolish the corporate character of the affected statutory corporations and vest their functions, rights and liabilities and employees directly in a Department of State. A Department of State is part of the Executive branch of the State as a polity; it is not a corporation. Alternatively, the State statutory corporations could be left intact and instead the employees could be ‘transferred’ to a Department of State which could then contract with the relevant statutory corporations for the provision of services. However, this second alternative presumably would expose such contracts for services to potential federal regulation.

The ability of a State to ‘insulate’ constitutional corporations operating within its boundaries from the effect of the *WorkChoices Act* is limited. Any direct attempt by a State to deny or interfere with the operation of the federal legislation will be rendered invalid by s 109 of the *Constitution*. In theory, each State could attempt to wind up the corporations ‘incorporated in’¹⁹¹ that State and replace them with a new kind of statutory ‘entity’ which mirrors the nature, rights and liabilities of those corporations. However, such an approach would face a number of difficulties. In the first place, it may be that an attempt by the States to wind up companies otherwise than according to the regime established by the *Corporations Act 2001* (Cth) would be invalid by reason of s 109 of the *Constitution*.¹⁹² It may also be the case that any attempt by the States to legislate

188 See, eg, *West v Deputy Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681-683; *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 77-84; *Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, especially 528-532; *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372.

189 As discussed above, the fact that such statutory corporations perform ‘governmental functions’ will not prevent them from being characterised as trading or financial corporations for the purposes of s 51(xx) of the *Constitution* if a substantial part of their activities involve trading or financial activities.

190 Subject to the reservation referred to above concerning the regulation of State employees at the ‘higher levels of government’.

191 Under the regime established by the *Corporations Act 2001* (Cth), it is strictly inaccurate to refer to the incorporation of a company ‘in a State’; rather companies are incorporated in the Commonwealth and are taken under that legislation to be registered in a particular State.

192 This aspect is further contemplated by the temptation, which may arise, for the States to withdraw or threaten to withdraw their referral of powers with respect to incorporation that underpin the *Corporations Act 2001* (Cth).

to frustrate the operation of the *WorkChoices Act* would attract s 109 on that ground alone. Moreover, presumably a federal law expressly preventing the States from winding up constitutional corporations already established would be a law with respect to such corporations for the purposes of s 51(xx).

Secondly, even if the States did create a new statutory 'entity' which mirrored the nature, rights and liabilities of constitutional corporations, the question would arise whether that 'entity' answered the description of a constitutional corporation for the purposes of s 51(xx). The nomenclature used by a State legislature cannot control the constitutional meaning of the expression 'corporation' in s 51(xx). To date, this issue has not arisen for determination by the High Court. However, the issues that arise appear in principle to be similar to those encountered in determining whether a foreign body is a corporation for the purposes of Australian municipal law. In that context, the critical features of a corporation for Australian law purposes were identified by Latham CJ in *Chaff & Hey Acquisition Committee v J.A. Hemphill & Sons Pty Ltd* as

a body which, as distinct from the natural persons composing it, can have rights and be subject to duties and can own property must be regarded as having a legal personality, whether it is or is not called a corporation.¹⁹³

If those principles are applied to the present context, any new statutory 'entity' created by the States would be likely to answer the constitutional description of a corporation.

Finally, it may be observed that any attempt by the States to wind up existing corporations and create some new statutory 'entity' in their place would create considerable economic and commercial uncertainty and instability.

X CONCLUSION

The *WorkChoices Act* no doubt represents a fundamental shift in workplace relations for the people of Australia. Other papers in this thematic issue address the significance of the new legislation from an employment law perspective. The constitutional significance of the *WorkChoices Act* lies primarily in the attempt to utilise the corporations power to establish an exclusive regime for determining the employment conditions of a majority of the Australian workforce.

If the High Court approaches the question of the validity of the *WorkChoices Act* by reference to the well established and orthodox principles of constitutional interpretation and 'characterisation', it is respectfully submitted that the bulk of the *WorkChoices Act* should be held valid. In particular, for the reasons discussed in this paper, most of the Act should have a sufficient connection with the corporations power on the basis that it either regulates the activities of constitutional corporations or incidentally regulates the conduct of natural persons.

Arguments that the corporations power is confined to regulating the 'trading activities' of trading corporations and the 'financial activities' of financial corporations or that the corporations power should be read down by reference to

193 (1947) 74 CLR 375, 385.

the conciliation and arbitration power are, it is suggested, unlikely to succeed in light of current authority.

Perhaps a more fertile ground for challenging the new legislation is to be found in notions of federalism and the appropriate federal balance. It is suggested in this paper that an argument that industrial or employment relations is an area that should be 'reserved' to the States is unlikely to be accepted by the High Court. It is also suggested that the existing 'tool' for preserving fundamental tenets of federalism, the *Melbourne Corporation* doctrine, could be developed to protect the States from a significant practical curtailment or impairment by the Commonwealth of their ability to perform their constitutional role of legislating on topics of practical importance to their inhabitants. The question whether the *WorkChoices Act*, in conjunction with other federal legislation and executive action, sufficiently impairs the practical ability of the States to legislate in that fashion is difficult to resolve. On one view, the States continue to be able to legislate on matters of practical importance such as health, education, police and transport. On the other hand, one of the most important concerns for today's society is the work relationship and the ability to earn a living. Accordingly, there would seem to be a reasonable argument that if the States are removed from that field, they would no longer retain the degree of 'practical significance' upon which the *Constitution* is predicated.